

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

The Appeals Board finds the Administrative Law Judge's preliminary hearing Order should be affirmed.

Specifically, this finding is supported by claimant's testimony that he felt pain and discomfort in his right groin area after he picked up a heavy concrete chute on September 4, 1998, while working for the respondent. After work, while taking a shower, claimant discovered a bump in his groin area.

After the Labor Day weekend, claimant notified the respondent of his problem and respondent recommended he seek unemployment benefits and also that he pay for any medical expenses through his personal health insurance. On September 8, 1998, claimant went on his own to his family physician who diagnosed a right inguinal hernia.

Finally, respondent referred claimant to a surgeon. The surgeon also diagnosed a right inguinal hernia and surgically repaired the hernia on October 15, 1998.

The medical records of claimant's family physician and the surgeon who repaired claimant's hernia were admitted into evidence at the preliminary hearing. Those records indicate claimant gave a consistent history of picking up a concrete chute at work on September 4, 1998, and feeling pain in his right groin area.

Two representatives of the respondent also testified in person before the Administrative Law Judge; Tim Skiles, a co-worker of claimant; and Ralph Pelky, respondent's general manager and claimant's immediate supervisor. Mr. Skiles testified claimant told him at work on August 25, 1998, he had a hernia before claimant's accident date of September 4, 1998. Ralph Pelky testified claimant got sick from working in the heat on September 4, 1998, but did not complain or did not demonstrate he had pain in his right groin area. In fact, Mr. Pelky testified he observed claimant at the end of the shift jumping around with no symptoms of injury.

The claimant denied telling his co-worker, Mr. Skiles, that he had a hernia on August 25, 1998. Claimant did testify he told Mr. Skiles he had hemorrhoids but not a hernia. The medical records of claimant's family physician prove claimant had received treatment for hemorrhoids before his work related accident.

The Appeals Board concludes, since all of the witnesses testified in person before the Administrative Law Judge, the Administrative Law Judge had the unique opportunity to assess their credibility. The Administrative Law Judge had to believe claimant when he found claimant's hernia occurred during a lifting incident while claimant was working for the respondent. The Appeals Board finds some deference should be given to the Administrative Law Judge because he did have the opportunity to observe the witnesses

testify. Therefore, giving some deference to the Administrative Law Judge, the Appeals Board finds the preliminary hearing Order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's preliminary hearing Order dated November 5, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
P. Kelly Donley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director